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September 25, 2001

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

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SEP 25 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC 01-268 ✓

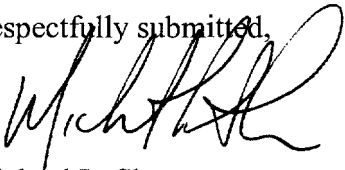
RE: Petition of US LEC of Virginia LLC Pursuant to Section 252(e)(5) of the Communications Act

Dear Secretary Salas:

Pursuant to section 51.803 of the Commission's Rules and Regulations, 47 C.F.R. § 51.803, enclosed for filing with the Commission are an original and seven (7) copies of the Petition of US LEC of Virginia LLC pursuant to Section 252(e)(5) of the Communications Act, together with the Declaration of Ms. Wanda G. Montano, in support thereof.

Please date stamp the extra copy of this filing and return to our messenger. Should you have any questions, please do not hesitate to contact me.

Respectfully submitted,


Michael L. Shor

cc: Service List (with attachments, by Federal Express)
Ms. Janice Myles (with attachments, by hand)
Qualex International

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED

SEP 25 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Petition of US LEC of Virginia L.L.C.)
Pursuant to Section 252(e)(5) of the)
Communications Act for Preemption of the)
Jurisdiction of the Virginia State Corporation)
Commission Regarding Interconnection)
Disputes with Verizon Virginia Inc.)

CC Docket No. 01-268

**PETITION OF US LEC OF VIRGINIA L.L.C
PURSUANT TO SECTION 252(e)(5) OF THE COMMUNICATIONS ACT**

US LEC of Virginia L.L.C. ("US LEC"), by its undersigned counsel and in accordance with Section 252(e)(5) of the Communications Act (the "Act"), 47 U.S.C. § 252(e)(5), and section 51.803 of the FCC's rules and regulations, 47 C.F.R. § 51.803, respectfully petitions the Federal Communications Commission ("FCC") to preempt the jurisdiction of the Virginia State Corporation Commission ("Virginia Commission"). The Virginia Commission has refused repeatedly to act in past interconnection disputes between competitive carriers and Verizon Virginia Inc. (f/k/a Bell Atlantic-Virginia, Inc.) ("Verizon") over the issue of reciprocal compensation for traffic bound for Internet service providers ("ISPs") and US LEC has no reason to expect that the Virginia Commission will take a different position in this dispute between Verizon and US LEC.

Specifically, in anticipation of an order from the Virginia Commission declining to exercise jurisdiction over a reciprocal compensation complaint, US LEC requests the FCC to take the following actions: (a) assume jurisdiction over US LEC's dispute with Verizon; (b)

following such proceedings as it deems appropriate, issue an order interpreting the reciprocal compensation provisions of the interconnection agreement between US LEC and Verizon; and (c) direct Verizon to pay US LEC reciprocal compensation for the transport and termination of traffic bound for ISPs, as contemplated by the agreement between the parties. In support thereof, US LEC respectfully states as follows:

Statement of Facts

1. US LEC and Verizon are local exchange carriers providing competing local telephone services in the Commonwealth of Virginia pursuant to authority granted by the Virginia Commission. (Declaration of Ms. Wanda G. Montano at ¶ 2) (hereafter “Montano Declaration”).

2. Pursuant to section 252(i) of the Act, 47 U.S.C. § 252(i), US LEC elected to adopt the interconnection agreement by and between Verizon and MCImetro Access Transmission Services that had been approved by the Virginia Commission on July 16, 1997 in Case No. PUC960013 (the “Agreement”). US LEC’s adoption of the Agreement was approved by the Virginia Commission on December 17, 1999 in Case No. PUC990166. (Montano Declaration, ¶ 3).

3. In accordance with its terms, the Agreement terminated on or about July 17, 2000, although the parties continue to operate under it pending execution or adoption of a new agreement. (Montano Declaration, ¶ 4).

4. Section 4 of Attachment I to the Agreement governs the payment of reciprocal compensation between the parties and provides that the parties shall compensate each other

reciprocally for the exchange of Local Traffic at rates set forth in Attachment I, which was later superseded by Appendix 2.¹ (Montano Declaration, ¶ 5).

5. Pursuant to the agreement, US LEC interconnected its network with Verizon's and began exchanging traffic. (Montano Declaration, ¶ 6). In the ordinary course of business, US LEC submitted invoices to Verizon seeking, in part, compensation for the exchange of traffic, including ISP-bound traffic. (*Id.*).

6. Verizon declined and refused to pay US LEC for a substantial portion of the invoiced amounts. Verizon claims that traffic volume in excess of a 2:1 ratio of US LEC terminating-to-originating traffic is telephone exchange service traffic handed off by Verizon to US LEC for termination to ISPs, and that it is not obligated to compensate US LEC for this traffic despite the clear requirement in the Agreement that the parties will pay such compensation for the transport and termination of all "Local Traffic", without regard for the identity of the terminating end-user or the type of traffic that is exchanged. (Montano Declaration, ¶ 7).

7. As a result of Verizon's refusals to pay reciprocal compensation properly due, and on or about September 14, 2001, US LEC filed a petition with the Virginia Commission seeking interpretation and enforcement of the Agreement. Specifically, US LEC's petition seeks a declaratory ruling directing Verizon to pay reciprocal compensation to US LEC for transporting and terminating Verizon's traffic to ISPs served by US LEC.² (Montano Declaration, ¶ 8).

¹ Copies of relevant pages from the Agreement are attached as Exhibit 3 to the Complaint US LEC filed against Verizon with the Virginia State Corporation Commission. That Complaint is attached hereto as Exhibit 1.

² A copy of the Complaint is attached as Exhibit 1.

8. On several prior occasions, the Virginia Commission has stated that it will not act on petitions requesting arbitration or enforcement of certain issues arising under federal law, including issues pertaining to reciprocal compensation for ISP-Bound traffic.³ (Montano Declaration, ¶ 9, 10). In its *Starpower/GTE Decision*, the Virginia Commission cited the FCC's *Declaratory Ruling*⁴ and *Separations Reform Order*,⁵ in finding that "the FCC's failure to act on either inter-carrier compensation or separations reform for ISP-traffic . . . has created great regulatory uncertainty."⁶ The Virginia Commission further stated that, in the absence of any FCC rules on inter-carrier compensation, "any interpretation of the instant agreements we might reach may well be inconsistent with the FCC's final order in its rulemaking."⁷ Additionally, the Virginia Commission also explained that until the issue of Eleventh Amendment immunity from federal appeal under the Telecommunications Act of 1996 ("Act") is resolved by the Courts of

³ See, e.g., *Petition for Declaratory Judgment and Application for Arbitration of AT&T Communications of Virginia, Inc., et al.*, Case Nos. PUC000261 and PUC000282, Order (Nov. 22, 2000) ("AT&T Order"); *Petition of Cox Virginia Telecom, Inc.*, Case No. PUC000212, Order of Dismissal, (Nov. 1, 2000) ("Cox Order"); *Petition of MCI Metro Access Transmission Services of Virginia, et al., for Arbitration*, Case No. PUC000225, Order (Sept. 13, 2000); *Petition of Focal Communications Corporation of Virginia*, Case No. PUC000079, Order (Jul. 19, 2000); *Petition of Cavalier Telephone, LLC*, Case No. PUC990191, Order (Jun. 15, 2000) *Petition of Starpower Communications, LLC for Declaratory Judgment Interpreting Interconnection Agreement with GTE South, Inc.*, Case No. PUC990023, Order (Jan. 24, 2000) ("Starpower/GTE Decision"); *Petition of Starpower Communications, LLC For Declaratory Judgment and Enforcement of Interconnection Agreement with Bell Atlantic-Virginia, Inc.*, Order Dismissing Petition, Case No. PUC990156 (Feb. 9, 2000).

⁴ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd. 3689, 3703, ¶ 22 ("Declaratory Ruling".)

⁵ *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, Notice of Proposed Rulemaking, 12 FCC Rcd. 22120 (1997) ("Separations Reform Order".)

⁶ *Starpower/GTE Decision*, at 5.

⁷ *Id.*, at 6.

the United States, the Virginia Commission will not take action under the Act's federally conveyed authority.⁸

9. Accordingly, the Virginia Commission consistently has declined to exercise jurisdiction over the issue of reciprocal compensation for ISP-Bound traffic arising under inter-connection agreements that the Virginia Commission previously had approved and, instead, has directed parties to pursue their cases with the FCC. (Montano Declaration, ¶ 10). In those instances where a party has sought such adjudication, the FCC has granted the preemption petitions.⁹

Argument

10. US LEC now respectfully requests the FCC take jurisdiction of and resolve US LEC's dispute with Verizon. By refusing to act on complaints concerning reciprocal compensation for ISP-Bound Traffic, the Virginia Commission has "fail[ed] to act to carry out its responsibility" under section 252 of the Act to resolve US LEC's complaint. Absent preemption, US LEC will be left without any legal remedy to resolve its dispute with Verizon over the interpretation of the Agreement, and to collect the amounts due to US LEC under that Agreement.

11. The FCC has authority to preempt the Virginia Commission and assume jurisdiction over this dispute pursuant to Section 252(e)(5) of the Act, which states as follows:

⁸ See, e.g., *AT&T Order*, *supra* note 3, at 2; *Cox Order*, *supra* note 3, at 4-5.

⁹ *Petition of Cox Virginia Telecom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission*, CC Docket No. 00-126, Memorandum Opinion and Order, DA 00-2118 (rel. September 18, 2001); *Petition of Starpower Communications, LLC for Preemption of Jurisdiction of the Virginia State Corporation Commission*, CC Docket No. 00-52, Memorandum Opinion and Order, FCC 00-216 (rel. June 14, 2000) ("*Starpower Preemption Decision*").

[i]f a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter . . . and shall assume the responsibility of the state commission under this section with respect to the proceeding or matter and act for the State commission.¹⁰

A. US LEC's Petition Arises Under Section 252 of the Act

12. In order for the FCC to assume jurisdiction under Section 252(e)(5), it must find that a State commission has “fail[ed] to act” in “any proceeding or other matter under this section[.]”

13. Both the FCC and federal courts have established that Section 252, by necessary implication, empowers the State commissions to interpret and enforce interconnection agreements they have approved.¹¹ Indeed, the FCC's *Declaratory Ruling* on inter-carrier compensation expressly recognized that the State commissions would, in the first instance, be responsible for resolving disputes over the interpretations of previously-approved agreements.¹² Therefore, a complaint proceeding requiring interpretation or enforcement of such an agreement is a “proceeding or matter” under Section 252.

¹⁰ 47 U.S.C. § 252(e)(5).

¹¹ See, e.g., *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999) (“state commissions’ plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved”); *Bell Atlantic-Virginia, Inc. v. WorldCom Techs. of VA., Inc.*, 70 F. Supp.2d 60, 626 (E.D. Va. 1997) (“the Telecommunications Act was designed to allow the state commission to make the first determination.”); *Starpower Preemption Decision*, *supra*, at ¶ 6.

¹² *Declaratory Ruling* at ¶¶ 24, 26 (“state commissions . . . have had to fulfill their *statutory obligation under section 252* to resolve interconnection disputes between incumbent LECs and CLECs”) (emphasis supplied).

B. The Virginia Commission Has Not Acted and Will Not Act

14. The Virginia Commission has made it abundantly clear in previous proceedings that it will not act on “proceedings or other matter[s]” under Section 252 concerning reciprocal compensation for ISP-Bound Traffic. The Virginia Commission’s election to “decline jurisdiction” in past complaints¹³ in a matter that is within its statutory and delegated authority under Section 252 of the Act suffices as “failing to act” for purposes of Section 252(e)(5).

15. In 1996, the FCC adopted “interim” procedures for implementation of Section 252(e)(5).¹⁴ Its procedural rules state that,

[f]or purposes of this part, a state commission fails to act if the state commission fails to respond, within a reasonable time, to a request for mediation, as provided for in section 252(a)(2) of the Act, or for [sic] a request for arbitration, as provided for in section 252(b) of the Act, or fails to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act.”¹⁵

16. In the *Starpower Preemption Decision*, the FCC recognized that those interim rules “did not consider whether a state commission could ‘fail to act’ in the context of a subsequent proceeding to interpret or enforce an existing interconnection agreement.”¹⁶

17. The FCC concluded in the *Starpower* case that resolving “a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements” is

¹³ See *supra* note 3.

¹⁴ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16122-16132 (1996) (*Local Competition Order*), *aff’d in part and vacated in part*, *Iowa Utils. Bd. v. FCC*, *supra*.

¹⁵ 47 C.F.R. § 51.801(b).

¹⁶ *Starpower Preemption Decision*, *supra* at ¶ 5.

within a state commission's "responsibility" under section 252.¹⁷ Thus, the FCC concluded that "a state commission's failure to 'act to carry out its responsibility' under section 252 can in some circumstances include the failure to interpret and enforce existing interconnection agreements."¹⁸

18. Thus, in both the Starpower case and the later Cox Communications case, the FCC concluded that, under substantive circumstances identical to those present here, the Virginia Commission had failed to act within the meaning of section 252(e)(5) and, as a result, the FCC granted the preemption petitions filed by those parties.

19. The only difference between this case and the Starpower and Cox cases is procedural, not substantive: US LEC has filed a complaint with the Virginia Commission seeking a determination that the relevant provisions of its interconnection agreement with Verizon require the payment of compensation for ISP-bound traffic.¹⁹ To be sure, the Virginia Commission has not yet declined to exercise jurisdiction over US LEC's complaint, but given its past decisions on the issue and the fact that the legal landscape has not changed since the Virginia Commission last declined to exercise jurisdiction over a reciprocal compensation dispute, there is no reason to believe that the Virginia Commission will reach a different result in this case.

¹⁷ *Id.* at ¶ 6.

¹⁸ *Id.*

¹⁹ US LEC adopted the interconnection agreement by and between Verizon and MCI Metro Access Transmission Services, Inc. This is one of the agreements adopted by Starpower and the interpretation of that agreement already is at issue in the proceeding between Starpower and Verizon in File No. EB-00-MD-20.

20. US LEC understands that FCC rules require the FCC to decide whether to assume jurisdiction over a complaint within ninety (90) days from the date of receiving notice that the state commission has failed to act.²⁰ US LEC expects that the Virginia Commission will enter an order declining jurisdiction over its complaint against Verizon during this period.

21. US LEC will notify the FCC once the Virginia Commission has entered the order declining jurisdiction. Similarly, in the unlikely event that the Virginia Commission accepts jurisdiction over US LEC's reciprocal compensation complaint, then US LEC will notify the FCC and withdraw the instant petition.

22. US LEC respectfully submits that the interests of justice are served by considering this preemption petition even before the Virginia Commission declines jurisdiction. In four separate instances, the Virginia Commission has declined to exercise jurisdiction over the issue of reciprocal compensation for ISP-bound traffic and there is no reasonable basis to believe that the Virginia Commission will reach a different result in this case. Under these circumstances, it would be a miscarriage of justice to require US LEC to wait for the inevitable—an order from the Virginia Commission declining jurisdiction—before permitting US LEC to seek preemption.

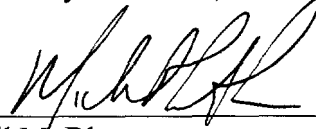
CONCLUSION

For the foregoing reasons, US LEC respectfully requests the FCC to preempt the jurisdiction of the Virginia State Corporation Commission regarding the interconnection dispute between US LEC and Verizon, to conduct such proceedings as it deems necessary to determine the merits of the disputes and, following such proceedings, to issue an order interpreting the

²⁰ See generally, 47 C.F.R. §51.803.

reciprocal compensation provisions of the interconnection agreement between US LEC and Verizon and directing Verizon pay US LEC reciprocal compensation for the transport and termination of traffic bound for ISPs, as contemplated by the agreement; and such other and further relief as the FCC may deem just and reasonable.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Blau', written over a horizontal line.

Russell M. Blau
Michael E. Shor
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
Tel: (202) 424-7775
Fax: (202) 424-7645

Counsel for US LEC of Virginia L.L.C.

Dated: September 25, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2001, true and correct copies of the foregoing Petition of US LEC of Virginia L.L.C. Pursuant to Section 252(e)(5) of the Communications Act, including all exhibits and attachments thereto, were served via Federal Express on:

Virginia State Corporation Commission
1300 East Main Street
Richmond, Va. 23219

President - Telecom Industry Services
Verizon
1095 Avenue of the Americas
40th Floor
New York, New York 10036

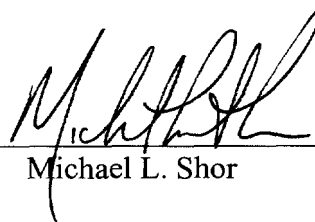
Verizon Network Services, Inc.
Attn: Jack H. White, Jr.
1515 North Court House Road
Suite 500
Arlington, Virginia 22201

Verizon – Virginia
Attn: General Counsel
600 East Main Street, 24th Floor
Richmond, Virginia 23261

Sumner Smith
US LEC Corp.
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Charlotte, NC 28211

Wanda G. Montano
US LEC Corp.
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Charlotte, NC 28211

John F. Dudley
Division of Consumer Counsel
Office of Attorney General
900 East Main Street, 2nd Floor
Richmond, VA 23219



Michael L. Shor

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Petition of US LEC of Virginia L.L.C.)	
Pursuant to Section 252(e)(5) of the)	
Communications Act for Preemption of the)	CC Docket No. _____
Jurisdiction of the Virginia State Corporation)	
Commission Regarding Interconnection)	
Disputes with Verizon Virginia Inc.)	

DECLARATION OF WANDA G. MONTANO

Wanda G. Montano, under penalty of perjury, declares as follows:

I am Vice President, Regulatory and Industry Affairs for US LEC Corp., parent corporation of US LEC of Virginia LLC ("US LEC"), petitioner in this matter. I have knowledge of the facts set forth herein and I make this Declaration in support of US LEC's Petition to the Commission (the "Petition") to preempt the jurisdiction of the Virginia State Corporation Commission ("Virginia Commission") with respect to disputes between US LEC and Verizon-Virginia ("Verizon").

1. US LEC and Verizon are local exchange carriers providing competing local telephone services in the Commonwealth of Virginia pursuant to authority granted by the Virginia Commission.
2. Pursuant to section 252(i) of the Act, 47 U.S.C. § 252(i), US LEC elected to adopt the interconnection agreement by and between Verizon and MCImetro Access Transmission Services that had been approved by the Virginia Commission (the "Agreement"). US LEC's adoption of the Agreement was approved by the Virginia Commission on December 17, 1999 in Case No. PUC990166.
3. In accordance with its terms, the Agreement terminated on or about July 17, 2000, although the parties continue to operate under it pending execution or adoption of a new agreement.

4. Section 4 of Attachment I to the Agreement governs the payment of reciprocal compensation between the parties and provides that the parties shall compensate each other reciprocally for the exchange of Local Traffic at rates set forth in Attachment I, which was later superseded by Appendix 2.¹

5. Pursuant to the agreement, US LEC interconnected its network with Verizon's and began exchanging traffic. In the ordinary course of business, US LEC submitted invoices to Verizon seeking, in part, compensation for the exchange of traffic, including ISP-bound traffic.

6. Verizon declined and refused to pay US LEC for a substantial portion of the invoiced amounts. Verizon claims that traffic volume in excess of a 2:1 ratio of US LEC terminating-to-originating traffic is telephone exchange service traffic handed off by Verizon to US LEC for termination to ISPs, and that it is not obligated to compensate US LEC for this traffic despite the clear requirement in the Agreement that the parties will pay such compensation for the transport and termination of all "Local Traffic", without regard for the identity of the terminating end-user or the type of traffic that is exchanged.

7. As a result of Verizon's refusals to pay reciprocal compensation properly due to US LEC, and on or about September 14, 2001, US LEC filed a petition with the Virginia Commission seeking interpretation and enforcement of the Agreement. Specifically, US LEC seeks a declaratory ruling directing Verizon to pay reciprocal compensation to US LEC for transporting and terminating Verizon's traffic to ISPs served by US LEC.²

8. On several prior occasions, and for a variety of different reasons, the Virginia Commission has stated that it will not act on petitions requesting arbitration or enforcement of certain issues arising under federal law, including issues pertaining to reciprocal compensation for ISP-Bound traffic.³

¹ Copies of relevant pages from the Agreement are attached as Exhibit 4 to the Petition US LEC filed against Verizon with the Virginia Commission.

² A copy of the Complaint is attached hereto as Exhibit 1.

³ See, e.g., *Petition for Declaratory Judgment and Application for Arbitration of AT&T Communications of Virginia, Inc., et al.*, Case Nos. PUC000261 and PUC000282, Order (Nov. 22, 2000) ("AT&T Order"); *Petition of Cox Virginia Telecom, Inc.*, Case No. PUC000212, Order of Dismissal, (Nov. 1, 2000) ("Cox Order"); *Petition of MCI Metro Access Transmission Services of Virginia, et al., for Arbitration*, Case No. PUC000225, Order (Sept. 13, 2000); *Petition of Focal Communications Corporation of Virginia*, Case No. PUC000079, Order (Jul. 19, 2000); *Petition of Cavalier Telephone, LLC*, Case No. PUC990191, Order (Jun. 15, 2000) *Petition of Starpower Communications, LLC for Declaratory Judgment*

9. Accordingly, the Virginia Commission consistently has declined to exercise jurisdiction over the issue of reciprocal compensation for ISP-Bound traffic arising under interconnection agreements that the Virginia Commission previously had approved and, instead, has directed parties to pursue their cases with the FCC. In those instances where a party has sought such adjudication, the FCC has granted the preemption petitions.⁴


10. I am not aware of any material change in the law, or any material difference in the facts presented by US LEC's dispute with Verizon, that would lead me to believe that the Virginia Commission will decide to accept jurisdiction over the Petition filed by US LEC against Verizon.

11. When it filed the Petition against Verizon, US LEC asked the Virginia Commission to decide the jurisdictional issue promptly.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on:

Sept 20, 2001


Wanda G. Montano

Interpreting Interconnection Agreement with GTE South, Inc., Case No. PUC990023, Order (Jan. 24, 2000) ("Starpower/GTE Decision"); *Petition of Starpower Communications, LLC For Declaratory Judgment and Enforcement of Interconnection Agreement with Bell Atlantic-Virginia, Inc.*, Order Dismissing Petition, Case No. PUC990156 (Feb. 9, 2000).

⁴ *Petition of Cox Virginia Telecom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission*, CC Docket No. 00-126, Memorandum Opinion and Order, DA 00-2118 (rel. September 18, 2001); *Petition of Starpower Communications, LLC for Preemption of Jurisdiction of the Virginia State Corporation Commission*, CC Docket No. 00-52, Memorandum Opinion and Order, FCC 00-216 (rel. June 14, 2000).

Please Date Stamp And Return

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September 13, 2001

VIA HAND DELIVERY

Mr. Joel H. Peck, Clerk
Virginia State Corporation Commission
1300 East Main Street
Richmond, VA 23219

ATTN: DOCUMENT CONTROL SECTION

Re: Petition of US LEC of Virginia LLC against Verizon Virginia Inc.

To the Clerk of the Commission:

Enclosed for filing please find an original and sixteen (16) copies of the Petition of US LEC of Virginia, LLC For Declaratory Judgment Interpreting and Enforcing Interconnection Agreement with Verizon Virginia, Inc. Pursuant to the Commission's rules, the original and fifteen (15) of the copies are for the Commission. Would the Clerk please date stamp the remaining copy and return it to the undersigned in the envelope enclosed for this purpose.

Recently, the Commission has declined to exercise jurisdiction over Petitions seeking similar relief. To the extent that the Commission will take that same position here, and decline to exercise jurisdiction over this Petition, then US LEC would appreciate it if the Commission would issue the order declining jurisdiction on an expedited basis.

Should you have any questions concerning the Petition, please call me immediately. Thank you for your assistance in this matter.

Very truly yours,


Michael L. Shor

Enclosures

cc: Ms. Wanda Montano
Sumner Smith, Esq.
Service List

2001 SEP 14 A 10:52

**COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION**

PETITION OF)	
)	
US LEC OF VIRGINIA L.L.C.)	
)	Case No. PUC 01-_____
For Declaratory Judgment Interpreting and Enforcing)	
Interconnection Agreement with Verizon Virginia, Inc.)	

PETITION OF US LEC OF VIRGINIA L.L.C.

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Counsel for US LEC of Virginia L.L.C.

Dated: September 13, 2001

**COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION**

PETITION OF)	
)	
US LEC OF VIRGINIA L.L.C.)	
)	Case No. PUC 01-_____
For Declaratory Judgment Interpreting and Enforcing)	
Interconnection Agreement with Verizon Virginia Inc.)	

PETITION OF US LEC OF VIRGINIA L.L.C

US LEC of Virginia L.L.C. (“US LEC”) through its undersigned counsel, and pursuant to Section 8.01-184 of the Code of Virginia and Rule VAC 5-20-100.C of this Commission’s Rules of Practice and Procedure, files this Petition against Verizon Virginia Inc. (f/k/a Bell Atlantic - Virginia, Inc.) (“Verizon”) seeking interpretation and enforcement of that certain *Interconnection Agreement* between US LEC and Verizon (the “Agreement”), adopted by the parties effective as of July 26, 1999.

INTRODUCTION

US LEC asks the Commission to interpret and enforce the Agreement in light of Verizon’s unilateral position that it will not make any payments to US LEC for traffic that exceeds a ratio of terminating to originating minutes that is found nowhere in the Agreement but, instead, has been defined unilaterally by Verizon. Verizon claims that traffic volume in excess of a 2:1 ratio of US LEC terminating-to-originating traffic is telephone exchange service traffic handed off by Verizon to US LEC for termination to US LEC’s exchange service end users who are Internet Service Providers or Enhanced Service Providers (collectively “ISPs”), and that it is not obligated to compensate US LEC for this traffic despite the clear requirement in the

Agreement that the parties will pay such compensation for the transport and termination of all “Local Traffic”, without regard for the identity of the terminating end-user.

Verizon’s stance is particularly egregious because it is adhering to a legally untenable position in the face of an express order of this Commission affirmatively rejecting Verizon’s position and specifically concluding that traffic terminating at ISPs is subject to the reciprocal compensation provisions of agreements such as the one at issue here.^{1/} Since the Commission previously has ruled that local traffic terminated at ISPs should be treated the same as other local traffic, US LEC requests that the Commission enter an order directing Verizon to compensate US LEC for the termination of local traffic originated by Verizon to US LEC’s end user customers, *including ISP customers*, pursuant to Attachment IV of the Agreement (providing for the reciprocal termination of local exchange traffic) at the rates set forth therein. There is no legitimate basis for Verizon to continue to refuse to compensate US LEC for ISP-bound traffic or any other kind of traffic, for that matter.

This conclusion is not impacted at all by the Federal Communications Commission’s recent reevaluation of the treatment to be accorded to traffic delivered to ISPs.^{2/} The FCC explicitly stated that its determination does not “alter existing contractual obligations,” and “does

^{1/} *Petition of Cox Virginia Telecom, Inc. for enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc. and arbitration award for reciprocal compensation for the termination of local calls to Internet Service Providers*, Case No. PUC-970069, Final Order (Oct. 24, 1997).

^{2/} *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 18, 2001) (the “ISP Remand Order”).

not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here.”^{3/}

PARTIES AND JURISDICTION

1. Both US LEC and Verizon are authorized to provide local exchange services in the Commonwealth of Virginia pursuant to certificates issued by this Commission.

2. Pursuant to section 252(i) of the Telecommunications Act of 1996, 47 U.S.C. 252(i), US LEC elected to adopt the interconnection agreement by and between Verizon and MCImetro Access Transmission Services, Inc. (“MCIIm”) (the “MCIIm Agreement”), dated June 16, 1997, which was approved by this Commission in an Order Approving Agreement entered on July 16, 1997 in Case No. PUC960113.

3. The terms of the Agreement specifically provide for the right of either party to petition the Commission – or other forum – in the event “that any dispute aris[es] out of or relat[es] to this Agreement that the Parties themselves cannot resolve”^{4/} Thus, the Commission has clear jurisdiction to interpret and to enforce the terms of the Agreement as alleged herein.

4. The FCC previously addressed the Commission’s jurisdiction to entertain enforcement actions like this one, stating that “in the absence of a federal rule, state commissions have the authority under section 252 of the Act to determine intercarrier compensation for ISP-

^{3/} *Id.* at ¶ 82.

^{4/} Agreement at section 24.1.

bound traffic.”^{5/} The recent *ISP Traffic Order* does nothing to displace this Commission’s jurisdiction as to the matters at issue in this Complaint as the FCC stated that its assertion of exclusive jurisdiction over ISP-bound traffic was prospective only.^{6/}

5. Correspondence regarding this Petition should be sent to US LEC at the following address:

Sumner N. Smith, Esq.
Senior Counsel
US LEC Corp.
6801 Morrison Blvd.
Charlotte, NC 28211
Tel: (704) 319-1119

Ms. Wanda G. Montano
Vice President, Regulatory and Industry
Affairs
US LEC Corp.
6801 Morrison Blvd.
Charlotte, N.C. 28211
Tel: (704) 319-1074

6. Correspondence regarding this complaint should be sent to US LEC’s attorneys as follows:

Richard M. Rindler
Michael L. Shor
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
Tel: (202) 424-7775
Fax: (202) 424-7645

7. Correspondence regarding this Petition should be sent to Verizon at the addresses specified in the Agreement, which are:

⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38 (rel. Feb. 26, 1999) (the "*Declaratory Ruling*") at ¶ 26 n. 87.

⁶ *ISP Traffic Order* at ¶ 82.

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Bell Atlantic Corporation
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New York, New York 10036
Facsimile (212) 597-2585

Bell Atlantic – Virginia, Inc.
Attn: General Counsel
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24th Floor
Richmond Virginia 23261

Bell Atlantic Network Services, Inc.
Attn: Jack H. White, Jr.
Associate General Counsel
1320 N. Court House Road, 8th Floor
Arlington, Virginia 22201
Telephone: (703) 974-1368
Facsimile: (703) 974-0744

and/or to such other individual(s) as Verizon may hereafter designate.

ADOPTION OF THE AGREEMENT

8. By letter dated July 1, 1999, US LEC notified Verizon that it desired to interconnect with Verizon in Virginia on the same terms and conditions as contained in the MCIImetro Agreement.^{7/}

9. Effective as of July 26, 1999, US LEC and Verizon entered into a written agreement (the "Adoption Agreement") to memorialize US LEC's adoption of the MCIImetro Agreement for the remaining term of that agreement.^{8/} The Adoption Agreement was filed with the Commission in Case No. PUC990166. and approved by it on December 17, 1999.^{9/}

10. Prior to US LEC's adoption of the MCIImetro Agreement, Verizon sought to impose an interpretation of the reciprocal compensation provisions of that agreement that was

^{7/} A copy of the letter is attached hereto as Exhibit 1.

^{8/} The Adoption Agreement is attached as Exhibit 2.

^{9/} Copies of relevant pages from the MCIIm Agreement are attached as Exhibit 3. The Opt-in Agreement and the MCIIm Agreement will be collectively referred to as the "Agreement."

inconsistent with the express terms of the agreement itself.^{10/} US LEC declined to accede to Verizon's unilateral, post-hoc, interpretation.^{11/} As a result, the Adoption Agreement that US LEC was required to sign when it adopted the MCImetro Agreement contained a clause that addressed the treatment of ISP-bound traffic. In it, the parties state their positions on the applicability of the Agreement's reciprocal compensation provisions to ISP-traffic, noting that they agreed to disagree as to the meaning of those terms, and preserved all their rights with respect to that issue.

11. Verizon's stated position does not alter any of the terms of the MCImetro Agreement itself, nor does it result in differing interpretations of the reciprocal compensation terms, one interpretation for MCImetro and another for US LEC. Under section 252(i) of the Act, the terms of the *original* MCImetro Agreement, expressing the intent of the *original* parties control the interpretation of this Agreement between US LEC and Verizon.

12. The MCIm Agreement was due to expire on July 17, 2000, but the Agreement provided that if a new agreement is not in place by that date, then the parties will continue to operate under the terms of the existing agreement until a new agreement can be negotiated.

THE TERMS OF THE AGREEMENT

13. Reciprocal Compensation is defined in Part B of the Agreement as:

refer[ring] to a reciprocal compensation arrangement between two carriers in which each of the two carriers receives compensation

^{10/} See, Letter dated July 26, 1999 from Robin L. Calcagno at Verizon to Kemal Hawa at Swidler Berlin Shereff Friedman, LLP, counsel for US LEC. A copy of the letter is attached as Exhibit 4.

^{11/} *Id.*

from the other carrier for the transport and termination on each carrier's network facilities of Local Traffic that originates on the network facilities of the other carrier.

(Agreement at Part B, p. 8.)

14. Section 4 of Attachment I to the Agreement governs the Parties' reciprocal compensation obligations and provides as follows:

Reciprocal Compensation for the exchange of Local Traffic is set forth in Table 1 of this Attachment and shall be assessed on a per minute-of-use basis for the transport and termination of such traffic.

(Agreement at Attachment I, p. 2.)

15. Local Traffic is defined in the Agreement at Part B-5 as:

traffic that is originated by an end user subscriber of one Party on that Party's network and terminates to an end user subscriber of the other Party on that other Party's network within a given local calling area, or expanded area service ("EAS") area, as defined in Bell Atlantic's Tariffs, or, if the Commission has defined local calling areas applicable to all Local Exchange Carriers, then as so defined by the Commission.

(Agreement at Part B, p. 5.)

16. The Agreement does not define "termination" as it relates to the definition of Local Traffic or the parties' reciprocal compensation obligations.

17. Nowhere in the Agreement is there any requirement that either Verizon or US LEC segregate calls to ISPs for any purpose at all, let alone for purposes of billing for reciprocal compensation.

18. Appendix 2 to the Agreement, entitled "Detailed Schedule of Itemized Charges," set the rates for "Local Call Termination" at \$.000927/mou for end-office termination and

\$.001590/mou for traffic delivered to a BA Tandem Switch. (Appendix 2 at p. 1, BA Services, Facilities and Arrangements, section I.) The rate for “Local Call Termination” delivered to US LEC was set at the same rates: \$.000927/mou for delivery to an end office and \$.001590/mou for traffic delivered to a Tandem switch. (Appendix 2 at p. 17, US LEC Services, Facilities and Arrangements, section I.)

19. Part A, Section 21.3.1 of the Agreement provides “If a billing dispute arises concerning any charges billed pursuant to this Agreement by a providing Party, payments withheld or paid pending settlement of the dispute shall be subject to interest at the rate set forth in Bell Atlantic’s interstate access tariff.” (Agreement at Part A, page 16).

20. The reciprocal compensation rates in the Agreement do not differentiate between ISP and non-ISP traffic.

21. The reciprocal compensation provisions of the Agreement are the only provisions of that Agreement governing compensation for Local Traffic.

22. Section 6.1 of the Agreement states: “[e]ach Party shall perform terms, conditions, and operations under this Agreement in a manner that complies with all Applicable Law, including all regulations and judicial or regulatory decisions of all duly constituted governmental authorities of competent jurisdiction.” (Agreement at Part A, p. 6.)

23. Finally, Section 39.1 of the Agreement states:

This agreement constitutes the entire agreement between the Parties on the subject matter hereof, and supersedes any prior or contemporaneous agreement, understanding, or representation on the subject matter hereof. Except as otherwise provided in this Agreement, the terms in this Agreement may not be waived or modified except by a written document which is signed by the Parties.